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Attorney for Defendant
Donovan Cloud

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
(Honorable Salvador Mendoza, Jr.)**

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DONOVAN CLOUD,
Defendant.

NO. 1:19-CR-02032-SMJ-2

MOTION FOR BILL OF
PARTICULARS

DATE: October 8, 2019
TIME: 8:30 A.M.

TO: Clerk of U.S. District Court, Eastern District of Washington

TO: Thomas J. Hanlon, Assistant United States Attorney

COMES NOW DONOVAN CLOUD by and through his attorney of record,
Richard A. Smith of *Smith Law Firm*, and moves the Court to direct the filing of a
Bill of Particulars by the Government.

This motion is made based upon Federal Rule of Criminal Procedure 7(f) and
the Memorandum of Points and Authorities submitted with this motion.

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1 DATED this 10th day of September, 2019.

2 Presented by:

3 /s/ Richard A. Smith

4 RICHARD A. SMITH, WSBA 15127

5 Attorney for Defendant Donovan Cloud

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12
13 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
14 **MOTION FOR BILL OF PARTICULARS**

15 Federal Rule of Criminal Procedure 7(f) provides as follows:

- 16 (f) **Bill of Particulars.** The court may direct the government to
17 file a Bill of Particulars. The defendant may move for a Bill of
18 Particulars before or within 14 days after arraignment or at a
19 later time if the court permits. The Government may amend the
20 Bill of Particulars subject to such conditions as justice requires.

21 A Bill of Particulars is “intended to supplement the Indictment by providing more
22 detail of the facts upon which the charges are based”. *United States v. Inryco, Inc.*,
23 642 F.2d 290 (9th Cir. 1981). By providing a defendant with the specifics of the
24 charge, a Bill of Particulars serves three purposes: (1) to aid a defendant in preparing
25 for trial; (2) to eliminate surprise at trial; and (3) to protect against double jeopardy.
26 See *United States v. Burt*, 765 F.2d 1364 (9th Cir. 1985). Close issues should be
27 resolved in favor of additional disclosure. As the court stated in *United States v.*
28

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1 *Manetti*, 323 F.Supp. 683 (D.Del. 1971):

2 The Bill of Particulars is designed to fill any gap between the facts
3 disclosed by the Indictment and that “set of facts” which will permit
4 the defendant the opportunity of preparation. What constitutes this
5 “set of facts” in a given case, however, is a somewhat elusive concept.
6 Obviously, it is something other than the minimum which would
7 apprise the defendant of the charges against him and, therefore, be
8 sufficient to sustain an Indictment. Otherwise, there would be no
9 purpose of a Bill of Particulars ... in the gray areas, the doubt must be
10 resolved in favor of disclosure and the conflicting concerns must yield
to paramount public interest in affording the accused a reasonable
foundation for mounting a defense. *Id* at 696.

11 In this case Donovan Cloud is charged together with James Dean Cloud in Count 4 of
12 the Superseding Indictment with a violation of 18 U.S.C. §§ 1201(a)(2), (g)(1), and
13 3559(f)(2), 2. 18 U.S.C. § 1201(a)(2) provides as follows:

14 § 1201. **Kidnapping.**

- 15 (a) Whoever unlawfully seizes, confines, inveigles,
16 decoys, kidnaps, abducts, or carries away or holds
17 for ransom or reward of otherwise any person,
18 except in the case of a minor by the parent thereof,
19 when –
20 (2) Any such act against the person is done within the
21 special maritime and territorial jurisdiction of the
United States ...

22 Count 4 of the Superseding Indictment charges as follows:

23 On or about June 8, 2019, in the Eastern District of Washington, the
24 Defendants, DONOVAN QUIN CARTER CLOUD and JAMES
25 DEAN CLOUD, both Indians, who were not parents, grandparents,
26 brothers, sisters, aunts, uncles, or individuals having legal custody of
27 Minor A, did unlawfully kidnap, abduct, confine, and seize a person
28 identified as Minor A, who had not then attained the age of eighteen
29 years, all within the boundaries of the Yakama Nation Indian
Reservation, in Indian Country; in violation of 18 U.S.C. §§

1 1201(a)(2), (g)(1), and 3559(f)(2), 2.

2 In the case of *United States v. Boykin*, 794 F.3d 939 (8th Cir. 2015), the defendant
3 challenged the sufficiency of the Indictment because it failed to contain the element
4 of kidnapping requiring that the purpose of the kidnapping was “for ransom, reward
5 or otherwise”. The court held that the noted language was not an essential element of
6 the 18 U.S.C. § 1201(a) charge. The court cited *Clinton v. United States*, 260 F.2d
7 824 (5th Cir. 1958):

9 It is difficult to see how the addition of the words “for ransom or
10 reward or otherwise” would have added anything to the Indictment
11 because obviously “otherwise” comprehends any purpose at all. If
12 appellant desired to know more of the purpose the government
13 intended to prove for his unlawful holding, he could have made a
14 proper motion before trial to that end. [emphasis added] His failure
15 to do so waived his right to raise the point after conviction. *Knight v.*
16 *Hudspeth* (Hudspeth), 112 F.2d 137 (10th Cir. 1940). *Knight v.*
United States, 137 F.2d 940 (8th Cir. 1943).

17 In this case, Count 4 fails to include the statutory language, “holds for ransom
18 or reward or otherwise” at all.

19 In the case of *United States v. Bentley*, 310 F.2d 685 (6th Cir. 1962), Mr.
20 Bentley claimed that the Indictment did not sufficiently charge the crime. The
21 Indictment charged him with holding the victims for “ransom, reward or otherwise”
22 when the evidence related solely to a purpose other than ransom or reward. In
23 response the court stated:

25 We are of the opinion that such an Indictment need not contain any
26 details of purpose or motive, and that it is sufficient if it charges such
27 purpose or motive to be for “ransom, or reward or otherwise ...”

28 If appellant had desired information as to the specific motive or
29 purpose claimed in the kidnapping Indictment, he could have secured

1 it by asking for a Bill of Particulars, as did his co-defendant in
 2 requesting the government to set forth the meaning of “otherwise as
 3 authorized by Rule 7(f) of the Federal Rules of Criminal Procedures”.

4 However, this does not mean that the phrase “held for ransom or reward or
 5 otherwise” is surplusage. The word to be emphasized is “held”, for “involuntariness
 6 of seizure and detention – is the very essence of the crime of kidnapping”. *Chatwin v.*
 7 *United States*, 326 U.S. 455 (1946). Thus the true elements of the offense are an
 8 unlawful seizure and holding ... *Hayes v. United States*, 296 F.2d 657 (8th Cir. 1961);
 9 *Clinton v. United States*, 260 F.2d 824 (5th Cir. 1958).

10 Count 4 of the Superseding Indictment fails to include the charging language of
 11 the kidnapping statute and fails to include the essential element of “holding”. *Gawne*
 12 *v. United States*, 409 F.2d 1399 (9th Cir. 1969). The charge does not provide the
 13 Defendant reasonable certainty of the nature of the accusation against him. The need
 14 for a Bill of Particulars regarding the omitted statutory language, i.e. the purpose and
 15 motive of the kidnapping, is particularly necessary here based upon the charge of
 16 kidnapping in Count 4 joined with the charge of carjack in Count 1 of the Superseding
 17 Indictment. As noted in *Clinton v. United States, supra*, “If appellant desired to know
 18 more of the purpose the government intended to prove for his unlawful holding, he
 19 could have made a proper motion before trial to that end”. Consequently, Donovan
 20 Cloud moves this Court for a Bill of Particulars as to Count 4 of the Superseding
 21 Indictment.
 22
 23

24 DATED this 10th day of September, 2019.

25 Presented by:

26 /s/ Richard A. Smith

27 RICHARD A. SMITH, WSBA 15127

28 Attorney for Defendant Donovan Cloud

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on September 10, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Thomas J. Hanlon, Assistant United States Attorney.

/s/ Lugene M. Borba

LUGENE M. BORBA

Legal Assistant, Smith Law Firm